Petition

81-1285

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

COSTABILE FARACE,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION—SECOND DEPARTMENT

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

QUESTIONS PRESENTED

(1) Whether a Court can properly take a plea of guilty from a defendant where his recitation of the facts do not clearly establish the elements of the crime to which he is pleading guilty.

(2) Whether the Court denied Petitioner's due process of law by denying him the opportunity to withdraw his plea, and by also denying him

an adjournment to make a formal motion to withdraw his plea.

(3) Whether as a matter of due process, the trial court should have made it clear to the petitioner that he was pleading guilty to crimes concerning which his factual statements may have been insufficient. In that regard, the question is whether the trial court should have pointed out that fact to determine whether petitioner was then; knowlingly, voluntarily and intelligently waiving his right to go to trial.

Petitioner, COSTABILE FARACE, respectfully prays that this Court issue a Writ of Certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated April 20, 1981, which affirmed his conviction rendered by the judgment of the Supreme Court of the State of New York, Kings County on September 8, 1980, convicting him of Manslaughter in the First Degree, upon his plea of Guilty, and sentencing him to a prison term of 7-21 years and a co-defendant, Mark Granato, received a prison term of 5-15 years.

A motion for reargument and modification was made to the Appellate Division, Second Department, which was denied by Order of the Appellate Division, dated May 20, 1981, and Leave to Appeal to the Court of Appeals of

the State of New York was denied by Associate Justice Meyer by certificate denying leave dated June 18, 1981, which was received by petitioner's attorney on or about June 22, 1981.

Petitioner is presently incarcerated and is serving his sentence.

JURISDICTION

Jurisdiction in this Court is invoked under Title 28, U.S. Code, Section 1257(3) and Rule 19, Subdivision 1 of the Rules of this Court. The judgment sought to be reviewed is the judgment of the Supreme Court of the State of New York, Appellate Division, dated April 20, 1981.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions are whether petitioner's rights under the due process clause of the Fourteenth Amendment was violated in permitting him to plead guilty to crimes where the elements were not established and in refusing to allow him to make a motion to withdraw such plea prior to his sentence.

FACTS

Petitioner and his co-defendant, GRANATO, pleaded guilty on the same day to the crime of Manslaughter in the First Degree and the Court asked each of them to explain his role in the slaying of a youth which occurred in Staten Island.

Apparently, a group of young men, who had been drinking, met the deceased in New York and they all repaired to a park section of Staten Island where there may have been some attempt to engage in sexual activity with the victim.

At the point where some of this conduct was about to take place, a melee ensued and four or more of the people involved struck the decedent who died of his wounds. There were multiple indictments and the petitioner and GRANATO pleaded guilty to a reduced charge of Manslaughter as did two other defendants who are not involved in this Writ of Certiorari.

The events which took place were communicated by all of the defendants, but each one's role in the tragic occurrence was different, so that the propriety of the Court's accepting the plea from each must be in part based upon a different recitation of each defendant of his involvement of the crime, which will be set forth hereafter.

Petitioner was initially charged with Murder. The case had always been before Mr. Justice Barlow, in the Supreme Court, Richmond County. After pre-trial motions were made, and in the middle of a hearing involving the propriety of the line-up conducted by the police, all motions were withdrawn and FARACE and GRANATO entered their pleas.

Thereafter, Mr. Justice Barlow suffered a heart attack and the sentencing was adjourned by telephone for approximately two or three months. Then the sentencing first came on before a new Judge, Mr. Justice Owens, during which time the defendants had been allowed to remain at liberty. The Court refused to allow FARACE's new attorneys to withdraw their plea of guilty and the Court then refused to allow an adjournment so that counsel could make formal written motions to that effect.

Counsel for FARACE specifically told the sentencing Court that he believed that certain issues should be preserved for appeal and that he was of the opinion at that time that the plea was insufficient since the facts elicited from Petitioner, FARACE, indicated possible justification or self-defense. FARACE had stated that he was

struck by decedent first who had cut petitioner's face with a knife. He, thereafter, reacted to the shock of being stabbed and he was also quite drunk at the time.

The plea was entered on May 29, 1980, and FARACE was asked to relate the facts of the incident. Petitioner told the Court:

> "DEFENDANT FARACE: Well, Your Honor, the night we went into Wolfe's Pond Park, we were all drinking. We were drinking all through the night there. We parked all the way at the end there, and then I saw one of the guys in the back getting a blow job from one -- from the colored guy, and then the white guy tried to grab my friend over here and my friend hit him, and then he hit the other --
> THE COURT: Which friend hit him?
> DEFENDANT FARACE: My friend Mark. He hit the white guy, and then the colored guy turned around and hit me. He grabbed my face and cut my face open. I was drunk and everything, so I got mad. I turned around and picked up a stick and I hit him with it a few times. I was angry because he hit me and cut my face.
> Then, I reacted after that, I hit him, but I meant to hurt him. I didn't mean to kill him.
> THE COURT: What kind of wood did you have in your hand?
> DEFENDANT FARACE: A piece of driftwood like.
> THE COURT: How thick was the wood?
> DEFENDANT FARACE: I don't know, a regular piece of wood, I guess like this. (Indicating).
> THE COURT: A piece of tree?
> DEFENDANT FARACE: No, no.
> THE COURT: Lumber?
> DEFENDANT FARACE: I guess like that, yeah.
> THE COURT: What size was it?
> DEFENDANT FARACE: I don't know, around like this. (Indicating).

THE COURT: How thick was it?

DEFENDANT FARACE: About like this. (Indicating).

THE COURT: Was it a two by four?

DEFENDANT FARACE: No. It was an old piece, it was driftwood, it was all like splintered.

THE COURT: A tree trunk piece, like a limb of a tree or something?

DEFENDANT FARACE: I don't know what it was. I know it was old, it was a piece of driftwood, it was old.

THE COURT: Where did you hit him, what part of his body?

DEFENDANT FARACE: Across the chest and his face.

THE COURT: How many times did you hit him?

DEFENDANT FARACE: A few times.

THE COURT: Was he standing up at all times while you hit him?

DEFENDANT FARACE: No, he wasn't.

THE COURT: How many times did you hit him after he fell down?

DEFENDANT FARACE: A few times I hit him.

THE COURT: What did you intend to do, you intended to hurt him?

DEFENDANT FARACE: I intended to hurt him, yeah.

THE COURT: Intend to hurt him badly?

DEFENDANT FARACE: I intended to hurt him. I didn't mean whatever happened.

THE COURT: Did you see blood on him?

DEFENDANT FARACE: It was dark there, I didn't see too much. We were drinking all night, we didn't really know.

THE COURT: You swung this piece of wood with both hands?"

It is clear from a reading of the statement made by petitioner that he told the Court he was very drunk first and had his face cut open with a knife. He also stated that he was angry, that he had been hurt and that he reacted by intending to hurt his assailant, but not kill him. He also related that he was drunk at the time, had been drinking all night and repeated that he did not intend the death of his assailant.

When the case came on for sentencing, FARACE changed attorneys and his new attorney, Martin Light, a member of this firm, appeared with him on September 8, 1980 and advised the Court that he thought that the entry of the plea was insufficient because the facts did not support the plea. Mr. Light asked for time to put in a written motion asking for the withdrawal of the guilty plea, but the Court denied that application and sentenced the petitioner to 7-21 years.

THE COURT allowed Mr. Light to orally discuss the merits of his contentions and in fact, the Court probably can be viewed as having actually denied, not only the adjournment but the substantial portion of the motion itself, to withdraw the plea.

POINT I

THE PLEA MINUTES CONCLUSIVELY DEMONSTRATED THAT THERE WAS AN INSUFFICIENT FACTUAL BASIS FOR THE ENTRY OF THE PLEAS HEREIN. COUNSEL'S MOTION MADE AT SENTENCE TO WITHDRAW THE PLEA SHOULD HAVE BEEN GRANTED.

Petitioner, COSTABILE FARACE, was convicted on his plea of guilty of Manslaughter in the First Degee, pursuant to Section 125.20 of the Penal Law, and was sentenced to from 7-21 years in prison. He is a young man who was a first offender and who changed his plea during a hearing on his motion to contest the propriety of the line-up in which he was placed. The Court questioned the petitioner about the factual basis for the plea, and it is submitted that these questions and answers conclusively demonstrated that there was an insufficient basis for the acceptance of the plea herein and for the establishment of Manslaughter in the First Degree. As such, it is contended that where the minutes do not support the plea taken, due process of law is denied. The statement of the petitioner clearly showed that he may have had a defense in the case because he said that he retaliated to the action of the decedent in striking him first and cutting his face with a knife. In addition, FARACE was drunk and said that he meant to hurt the decedent, but had not intended the consequences that followed: Petitioner told the Court:

"DEFENDANT FARACE: Well, Your Honor, the night we went into Wolfe's Pond Park, we were all drinking. We were drinking all through the night there. We parked all the way at the end there, and then I saw one of the guys in the back getting a blow job from one -- from the colored guy, and then the white guy tried to grab my friend over here and my friend hit him, and then he hit the other --

THE COURT: Which friend hit him?

DEFENDANT FARACE: My friend, Mark. He hit the white guy, and then the colored guy got out and hit him, and then the colored guy turned around and hit me. He grabbed my face and cut my face open. I was drunk and everything, so I got mad. I turned around and picked up a stick and I hit him with it a few times. I was angry because he hit me and cut my face.

Then I reacted after that, I hit him, but I meant to hurt him. I didn't mean to kill him."

Thereafter, at sentence, petitioner's attorney specifically asked to withdraw the plea and specifically told the Court that the plea minutes were insufficient. It is clear that not only was the action of the Court in denying the motion to withdraw the plea improper, but the Court was also under a duty not to take the plea or to stop the entry of the plea when it became aware or should have become aware that the factual basis was insufficient.

The recent case of People v. Greenblatt, 72 A.D.2d, 587, (Second Dept. 1979) involved a plea taken to the crime of Reckless Endangerment in the First Degree, but

when the defendant was asked to relate the facts upon which he was pleading guilty, he said that he fired his weapon neither "in the vicinity" nor "in the direction" of the complainant, but into an empty van about fifty feet away. This Court concluded that that statement did not constitute the crime pleaded to. This Court said that where a sufficient factual foundation is not laid for the acceptance of the plea, it is incumbent upon the Court not to proceed (Emphasis added), without advising the defendant that the facts related did not constitute an admission of the crime to which defendant was pleading. The Court also said where the defendant casts doubt upon his guilt, the Court had to offer him an opportunity to withdraw his plea. In that case an application was orally made by new counsel at the time of sentence to withdraw the plea, and the Court said that that application should have been granted.

It is most respectfully submitted in this case, the petitioner did not confess to the elements which would constitute Manslaughter in the First Degree and, in fact, he told the Court that he was only retaliating to an attack upon him made with a knife or weapon which caused his face to be cut. Certainly, had the petitioner come to trial, there would have been a reasonable possibility that he would

have been found not guilty, and the Court should not have taken the plea. Not only that, when it was later pointed out to the Court upon the date of sentence that the plea was insufficient, the Court, at the very least, should have read the plea minutes, considered the application very carefully and, on the facts that were elicited in this case, the motion to withdraw should have been granted.

If one of the elements is missing, or the facts do not establish the crime, the Court cannot accept the plea. People v. Gina, M. M., 40 N.Y.2d, 595 (1976); People v. Serrano, 15 N.Y.2d, 304 (1965); People v. Nixon, 21 N.Y.2d 338 (1967); People v. Beasly, 25 N.Y.2d, 483 (1969).

In People v. Serrano, supra, the defendant, indicted for Murder in the First Degree, stood trial under the representation of three assigned counsels. Following the selection of the jury and the opening statement by the prosecution, he pleaded guilty, with the knowledge of counsel and consent of the District Attorney, to Murder in the Second Degree, and was sentenced to a term of thirty years to life which the Appellate Division affirmed.

The New York Court of Appeals reversed the judgment and remanded with a direction that the defendant be per-

mitted to replead. It found that the Court which accepted his plea of guilty first heard the People's version of the crime and then interrogated the defendant, "not only as to the circumstances surrounding the change in plea but also as to the facts concerning the homicide itself." What the Trial Court thus learned led the Court to the opinion that the homicide, the commission of which the defendant admitted, was more consonant to a lesser charge of Manslaughter in the First Degree. As Fuld, J., put it in his opinion:

> "However, instead of rejecting the change of plea or advising the defendant that his admissions might very well not amount to the crime to which he pleaded guilty and inquiring further whether he, nevertheless, wished to plead guilty -- for instance, to avoid the risk of a jury verdict of first degree murder -- the trial judge took it upon himself to resolve these differences by deciding that the defendant was not subject to belief. It is our view, as it was that of VALENTE, J., dissenting in the Appellate Division, that the resolution of the inconsistencies in the versions of the occurrence was not within the province of the court. In the words of JUDGE VALENTE, 'Those were questions for a jury to decide in determining defendant's guilt or innocence unless there was the interposition of a valid plea of guilt".
>
> He continued:
>
> "Under the circumstances here presented, we do not see how it may properly be said that such a 'valid plea of guilty'was interposed. It is true, as this Court declared in People v. Griffin, (7 N.Y.2d, 511, 516) that, '(a)fter a plea to a lesser crime has been accepted, the factual basis of the crime confessed can ordinarily be found only in the language of the plea'. But, where, as is the usual case today,

> the trial court, before accepting the plea of guilty, properly inquires of the defendant as to the circumstances and details of the crime to which he is admitting his guilt, the mere mouthing of the word 'guilty' may not be relied upon to establish all the elements of that crime. In such case, the requisite elements should appear from the defendant's own recital and, if the circumstances of the commission of the crime as related by the defendant do not clearly spell out the crime to which the plea is offered, then the Court should not proceed, without further inquiry, to accept the guilty plea as a valid one."

It is important to note that Judge Fuld took cognizance of the fact that no application was made by Serrano on his behalf to withdraw the plea of guilty, either before or at the time of sentence. We stress this fact because Fuld, J. made it clear beyond contradiction in the Serrano case -- and we submit in the case at bar -- that:

> "* * *the trial judge should not, in the first instance, have accepted his plea of guilty. It was, instead, his duty to refuse the plea and order the trial continued or, more appropriately, to advise the defendant that his admissions did not necessarily establish guilt of the crime to which he was pleading and to question him further both with regard to his story of the crime and as to the possible disposition of his request to change his plea. (Cf. People v. Morales, 17 A.D.2d, 999, supra)".

It is true that Judge Fuld conceded that the Court could ultimately have accepted a plea of guilty, but only if the defendant understood that he had the option to withdraw the plea of guilty but persisted in the opportunity to plead, "perhaps to avoid the risk of conviction upon a trial of the more serious crime

charged in the indictment". This possible acceptance of the plea was, however, joined by the caveat that "* * *the Court should take all precautions to assure that the defendant is aware of what he is doing. Manifestly, no such cautionary effort was here made". Of course, in the case at bar, appellant did attempt to withdraw his plea prior to sentence.

Since the Serrano case, many other courts have had to deal with the problem of trial courts taking pleas without sufficient inquiry and where the facts did not establish the crime pleaded to.

In People v. Beasly, supra, at page 487, the Court of Appeals said, "Although defendant's statement at sentence is somewhat vague, it may be interpreted to mean that he did not participate in the robbery forming the basis of the felony-murder charge. This, if true, would remove one of the basic elements of the crime and demand a reversal". The Court then went on to add that where the element of the crime was missing a plea would have to be vacated.

It is submitted that the case at bar goes much further than either Serrano or Beasly. In Serrano there was no motion to withdraw the plea, unlike this case, and in

Beasly the defendant's statements were vague, also unlike this case, because here the petitioner categorically stated that he acted in self-defense.

In People v. Ellsworth, 57 A.D.2d, 768 (First Dept. 1977), the defendant was charged with forging an endorsement on a check, but when he was questioned, while he admitted writing the name, he contended that he had verbal permission to do so. Thus, a question of a possible defense and lack of criminal intent was raised and the Appellate Division reversed the judgment and vacated the plea.

There was a similar problem in People v. Munk, 59 A.D.2d, 915 (Second Dept. 1977), where the Court reversed a manslaughter conviction where the defendant made statements which indicated that the gun had been pulled on him and that there might be a self-defense issue.

This Court said, "Where -- as in the case at bar, the Court, at the plea hearing, elicits information from the defendant which casts doubt upon his guilt of the crime to which he is pleading, the Court should not proceed to accept the guilty plea without further inquiry". (Citations omitted).

Likewise, in People v. Cullen, 57 A.D.2d 903 (Second Dept. 1977) the Court also accepted the idea that a

Court should not accept the plea of guilty where the "requisite elements" do not appear from the defendant's own recitation and where the circumstances of the crime as related by the defendant do not make out the crime pleaded to. Of course, the defendant could always continue to take the plea pursuant to Serrano or those other decisions where the crime was not made out but only where other special precautions were taken, and the defendant knew what he was doing, waived that requirement and where other careful inquiry was made. This, of course, is not the case at bar, since there was no discussion along those lines. Of course, merely mouthing the word "guilty" cannot be relied on to establish the elements of the crime since each element should be contained within the defendant's own recital of the facts which should form the basis in fact for the taking of the plea. People v. Etoli, 57 A.D.2d 973 (Third Dept. 1977); People v. Idlett, 51 A.D.2d 753 (Second Dept. 1976).

Petitioner recognizes the law that even if the facts did not make out the crime to which the plea has been taken, the federal constitution may not require a reversal where the taker of the plea clearly understood the nature of what he was doing and waived all of his relevant constitutional

rights. We submit, however, that in such a case, careful and further inquiry should be made so that the defendant clearly knows what is is pleading guilty to, even though his recitation of the facts is insufficient.

If he knew that his conduct did not amount to the crime pleaded to, he might have decided not to take the plea. Thus, the legal sufficiency of the facts is paramount in determining whether or not he waived his constitutional rights, and, knowingly, voluntarily and intelligently took the plea. Boykin v. Alabama, 395 U.S. 238 (1969); Domenica v. United States, 292 F.2d 483 (1st Cir. 1961); Adkins v. United States, 298 F.2d 842, cert. den. 370 U.S. 954 (8th Cir. 1962); Edwards v. United States, 256 F.2d 707 (D.C. Cir. 1958).

CONCLUSION

THE PETITION OF CERTIORARI
SHOULD BE GRANTED.

Respectfully submitted,

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MEYER, LIGHT & LONDON
OF COUNSEL

At a Term of the Appellate Division of the State of New York, Second Judicial Department, held in Kings County on April 20, 1981.

HON. MILTON MOLLEN, Presiding Justice,
HON. JOHN P. COHALAN, Jr.,)
HON. CHARLES MARGETT,) Associate Justices
HON. FRANK D. O'CONNOR.)

---X

The People of the State of New York,

Respondent,

v/ ORDER

Robert DeLicio, Costabile Farace and Mark Granato,

Appellants.

---X

In the above entitled cause, the above named Robert DeLicio, Costabile Farace and Mark Granato, defendants in this action, having appealed to this Court from three judgments (one as to each of them) of the Supreme Court, Richmond County, all rendered September 8, 1980, convicting each defendant of manslaughter in the first degree, upon his respective plea of guilty, and sentencing defendants DeLicio and Granato to prison terms of 5 to 15 years, and defendant Farace to a prison term of 7 to 21 years; and the said appeals having been argued by John M. Murphy, Jr., Esq., of counsel for appellant DeLicio, argued by Stanley M. Meyer, Esq., of counsel for appellants Granato and Farace (separate briefs filed), and argued by George E. McVay, Esq., of counsel for respondent, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgments as to defendants Granato and Farace are hereby unanimously affirmed, and it is further

ORDERED that the judgment as to defendant DeLicio is hereby modified, as a matter of discretion in the interest of justice, by reducing his sentence to a period of imprisonment of two to six years, and, as so modified, said judgment is hereby unanimously affirmed, and it is further

ORDERED, that with respect to defendants DeLicio and Farace, the cases are hereby remitted to the Supreme Court, Richmond County, for further proceedings pursuant to CPL 460.50 (subd. 5).

E N T E R

IRVING N. SELKIN

Clerk of the Appellate Division

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. BERNARD S. MEYER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

COSTABILE FARACE and MARK GRANATO,

Defendants-Appellants.

Certificate Denying Leave

I, BERNARD S. MEYER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
June 18, 1981

BERNARD S. MEYER
Associate Judge

Order of the Appellate Division, Second Department, entered April 20, 1981, affirming two judgments of the Supreme Court, Richmond County (one as to each defendant), both rendered September 8, 1980, convicting defendants of manslaughter in the first degree.

*Description of Order: